NO. 91-592

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

EUGENE OWEN AND DORA OWEN, Individually and as Next Friend for ALICIA MARIE OWEN, a Minor,
Petitioners

versus

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Louisiana statute R.S. 40:1499.42, limiting medical malpractice damages, *which sets out specific conditions precedent to it's applicability to any person or entity,* limits the tort liability of the United States Government and it's agent physician *when it is undisputed that said conditions precedent to it's applicability were never performed and never occurred,* and the Federal Tort Claims Act mandates that the tort liability of the United States shall be to the same extent and in the manner as an individual under the law of the state.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

NO.____

EUGENE OWEN AND DORA OWEN, Individually and as Next Friend for ALICIA MARIE OWEN, a Minor,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Petitioners, Eugene Owen and Dora Owen, Individually and as Next Friend for Alicia Marie Owen, a Minor, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on July 18, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U. S. v. Owen, et al*, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on July 18, 1991, which appears at Appendix B. Jurisdiction to review by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1254(1).

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

28 U.S.C. § 2674. Liability of United States

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF FACTS

The minor plaintiff, Alicia Owen, through the negligence of Army physicians at Ft. Polk, Louisiana, suffered a permanent crippling of her left foot and permanent urinary and bowel incontinence, which will cause continuous urinary dribbling and as she grows older will require frequent catheterizations, which are likely to cause repetitive infections, and a loss of sensation from her anus through her vagina. The evidence showed her to be a mentally bright child, who at four years of age, had already begun to suffer embarrassment over her condition. The Trial Court found negligence of said physicians, proximate cause, and damages in the sum of $3,902,400.00.

At the time of said negligence and trial and at this time, the State of Louisiana had and has a statute that did not apply across the board to all persons lawfully practicing medicine, but which sought to limit recovery against

certain health-care providers, specifically providing that *to be qualified for such damage limitation* a health-care provider *shall* pay a specific surcharge to it's liability insurer, or if self-insured, to the State Commissioners of Insurance. La. R.S. 40:1299:42. *Said surcharge is to be paid by the collector thereof into a trust fund for the benefit of all* medical malpractice claimants, known as the Patients' Compensation Fund. La. R.S. 40:1299:44. The maximum liability for a complying physician is limited to $100,000.00 and said Fund's liability is limited to $400,000.00 for damages in excess of said $100,000.00. The Louisiana statutes further provide that administrative review and action by a medical review board shall be a *prerequisite* to the filing of any malpractice suit *against one who has paid said surcharge and is protected by the act.*

Neither the government nor its agent, who was guilty of the medical malpractice herein, performed the statutory condition precedent to the right to claim the protection of said statutory cap by paying into said fund. Though the *Court of Appeals* opinion *admits* that *any individual who failed to perform said statutory condition precedent could not claim the benefit* of said damage limitation, nevertheless, the Court of Appeals applied said damage limitation in favor of the United States in direct contravention of the mandate of the Federal Tort Claims Act and reduced the minor Plaintiff's recovery to a sum within said damage limitation cap.

REASONS FOR GRANTING WRIT

I.

The United States Court of Appeals has decided herein an important question of Federal law which has not been, but should be settled by this Court.

II.

In rendering a decision that directly contravenes the express congressional mandate of the Federal Tort Claims Act the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Courts power of supervision.

The Federal Tort Claims Act specifically provides that the federal government shall be liable for tort claims, "*in the same manner and to the same extent as a private individual under like circumstance*", *28 U.S.C. 2674.*

The Louisiana courts have correctly held that because its Medical Malpractice Act is in derogation of the general rights available to tort victims, the act must be strictly construed, *Head v. Erath Gen. Hosp., Inc.*, 458 So.2d 579, *Williams v. St. Paul Ins. Co.*, 419 So.2d 1302. The Louisiana courts have further held that *payment of said surcharge into the Patients Compensation Fund and it's continued payment is a condition precedent* for any health-care provider to claim any benefit or protection under any part of the Louisiana Medical Malpractice Act, *Williams v. St. Paul Ins. Co.*, supra. It is elemental that *any litigant asserting a defense* or ground of recovery *which is predicated upon a condition precedent has the burden of pleading and proving* performance of said condition precedent. Such universally accepted principle has been specifically applied by the Louisiana courts to any litigant claiming any protection under said Medical Malpractice Act, *Goins v. Texas State Optical, Inc.*, 463 So.2d 743.

The Court of Appeals arrived at the illogical conclusion that the United States enjoys the damage cap upon the erroneous theory that the only purpose of the *condition precedent of a physician contributing to the Patients' Com-*

pensation Fund is simply to insure that a person *injured by the negligence of a particular physician* who has elected to come within the act will be assured of compensation up to $500,000.00, and that since the United states is solvent in excess of $500,000.00, it has met the objectives of the Louisiana statute and is in *like circumstances* as an *individual who has contributed to the fund if it agrees, after the fact, to pay the $500,000.00.* Said opinion states that the reason a solvent millionaire doctor, who had not contributed to the fund, obviously could not claim the damage cap is because wealth is subject to fluctuation but that the federal government's solvency is certain and perpetual. This far-fetched theory for achieving this misconceived purpose of the Louisiana statute through after the fact judicial fiat, fails to recognize that the money paid into the trust fund is *not just for* the benefit of *persons injured by the particular person or entity that paid same.* Such money paid by a person or entity is for the benefit of *any* person *injured by any other person or entity* who has paid into said fund, even though said other person or entity is insolvent. The government, like any other particular health care provider, might not ever have a malpractice judgment against it in excess of $100,000.00, *but said surcharge money if it had been paid in, would be available for the protection of any person injured through malpractice by other health care providers who had elected to come within the statute* and who had the unusual misfortune of such judgment against it. This is the true purpose of the surcharge payment being an absolute condition precedent to any person or entity obtaining benefit of the statute. *The fact of the government's solvency obviously would not help a victim of malpractice by a non-government physician—payment of the surcharge into the fund would, and such is it's obvious purpose. Such purpose was not fulfilled by the government.* Thus, it follows, if logic and legal principles are not totally discarded, that the F.T.C.A.'s mandatory declaration that the

government shall be liable to the same extent and in the same manner as an individual under like circumstances absolutely prevents the government from claiming the damage limitation of the Louisiana Malpractice Statute. The government cites *Lucas v. United States, supra, Taylor v. United States,* 821 F.2d 1428, *Scheib v. Florida Sanitarium and Benevolence Assn.,* 759 F.2d 859, as authorities for the proposition that said Louisiana statutory damage cap for certain health-care providers limits it's liability. *Said decisions* are all patently correct but *are manifestly not in point as was recognized by the Court of Appeals' opinion.* Every state requires that health providers be licensed in order to *lawfully* provide such care. The Texas, California, and Florida statutes, considered in said decisions, *apply across the board* to *every* person or entity *lawfully providing health care.* Obviously, the government and it's army physicians in said states are *lawfully* providing health-care and *to refuse to accord* said damage cap to the government and it's said physicians would directly contravene the congressional mandate that the government shall be liable for it's torts "in the same manner and to the same extent as a private individual under like circumstances", but here, in this case, *to accord* said damage cap to the government under Louisiana law would be a direct violation of said constitutional mandate for the reason that unlike the Texas, California and Florida statutes, the statute *does not apply across the board* to *all* persons and entities *lawfully providing health-care,* but *applies only* to those persons and entities who have voluntarily initially paid and continue annually to pay a surcharge into a private trust fund to benefit persons injured by malpractice by *any physician* who paid into said fun. The United States District Court in this case recognized this clear distinction, and, thus, correctly decided this case. This distinction was likewise recognized in the Court of Appeals' opinion.

The Court of Appeals cites *Roelofs v. United States,* 501 F.2d 87, as supporting the theory that said federal statutory mandate, that the government tort liability be in the same manner and to the same extent as a private individual under like circumstances, should not be specifically applied in this case because said case holds that though the government did not have a workman's compensation insurance policy, certain defenses accorded individual employers under the state compensation law should be accordedd the government as to it's torts the same as other employers. Said case is clearly correct but not even remotely in point. In *Roelofs v. United States,* supra, the state statute had created a "*statutory employer*", defined as a contractor who hires another contractor or subcontractor to do his work. Said state then denied certain defenses to such *statutory employer* if it failed to carry workman's compensation to protect the employees of such subcontractors. Since, in *Roelofs v. United States,* supra, the government by written contract had required the subcontractor to carry workman's compensation and it's cost was to be billed to the government as part of the contract price, the Court quite correctly held that the government had, for all practical purposes, *fully complied with* and *accomplished the purpose* of the statute and was entitled to the same defense as an individual who had also complied. The Fifth Circuit in said case *noted that it's opinion should not be construed to hold that such defense would be accorded the government if it had not had said contractual provisions.*

Either the express congressional mandate that the United States shall be liable for its torts "in the same manner and to the same extent as a private individual under like circumstances" means something or it means nothing. The Court of Appeals opinion concedes that a private individual who had not complied with the express condition precedent of the Louisiana statute, even if a millionaire,

could not claim the protection of the damage limitation cap. To permit said congressional mandate to be ignored to the extreme detriment of those persons who suffer the most serious and permanent disabilities from government health-care negligence in the state of Louisiana is an injustice that should be corrected by this Honorable Court's grant of a writ of certiorari.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and petitioners accordingly so pray.

Respectfully submitted:

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CERTIFICATE

I hereby certify that 3 true copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, D. Bruce La Pierre, Civil Division, Room 3617, Department of Justice, Washington, D. C. 20530.

W. V. Dunnam, Jr.

APPENDIX A

Eugene OWEN and Dora Owen, Individually and As Next Friend For Alicia Marie Owen, A Minor,
Plaintiffs-Appellees,

v.

UNITED STATES of America,
Defendant-Appellant.

No. 90-8195.

United States Court of Appeals,
Fifth Circuit.

July 18, 1991.

Parents filed a Federal Tort Claims Act action against the United States to recover for the negligence of Army hospital physicians who treated their daughter. After a nonjury trial, the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., found government physicians negligent and awarded $3,902,400 in damages and ruled that United States could not rely on Louisiana's medical malpractice liability cap. The United States appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) although United States had not contributed to patient's compensation fund, it was in like circumstances with private individuals who had contributed to the fund and thus could avail itself of malpractice liability cap, and (2) malpractice liability cap was valid under Louisiana Constitution.

Reversed and remanded.

Appeal From the United States District Court for the Western District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and JONES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The United States appeals an order denying it the protections of Louisiana's malpractice liability cap. We conclude that, although it has not contributed to a patient's compensation fund, the United States is in "like circumstances' with private individuals who have contributed to the fund, and that the cap is valid under the Louisiana constitution.

I.

Eugene and Dora Owen, individually and as next friends of their daughter Alicia Marie Owen, filed this action against the United States under the Federal Tort Claims Act to recover for the negligence of physicians at an army hospital in Fort Polk, Louisiana. The Owens contend that the physicians failed to timely detect and diagnose a dermoid cyst in the lower region of Alicia's back.

We reach in this appeal only the issue of the availability of Louisiana's malpractice liability cap to the United States and its validity under Louisiana Law. *See* La.R.S. § 40:1299 (West Supp.1991). After a non-jury trial, the district court found that government physicians were negligent and awarded $3,902,400 in damages. The district court postponed entry of the judgment, however, pending the Louisiana Supreme Court's consideration of the validity of the cap under the state constitution in *Williams v. Kushner*, 549 So.2d 294 (La. 1989), and this court's con-

sideration of the availability of the liability cap as a defense to the United States in *Simon v. United States*, 891 F.2d 1154 (5th Cir. 1990).

When neither court reached the relevant issue, the district court concluded that the United States could not rely on the cap because it had not contributed to a patients' compensation fund as required by the statute. His decision conflicted with that of the only other Louisiana district court to have considered the issue. *See Kennedy v. United States*, 750 F.Supp. 206 (W.D.La.1990). The United States now appeals to this court, and we reverse.

II.

[1] The Owens first contend that the United States did not properly present the cap issue to the district court. We disagree. As the district court noted in its opinion, the United States both pled § 40:1299.42 as a defense in its second amended answer and set forth the cap as one of its contentions in the pre-trial order. The Owens emphasize that the United States listed the cap as a contention, and not a disputed issue, in the pre-trial order. They quote extensively from *Simon v. United States*, 891 F.2d 1154 (5th Cir.1990), where we held that the United States waived § 40:1299.42 as a defense by failing to raise it until after trial in a Fed.R.Civ.P. 59(e) motion to alter or amend the judgment. In *Simon*, we described the cap as an issue that was at least partially factual, and we rejected the United States' contention that the Rule 59(e) motion was a "pragmatically sufficient time" to raise the defense because we believed that it would have changed "the character of the trial" had it been raised earlier. *Id.* at 1159. The fact that the United States both pled the cap and specifically noted it in the pre-trial order distinguishes *Simon*. The Owens clearly had sufficient notice that the United States would rely on § 40:1299.42.

III.

[2] Louisiana cannot by its law make the United States liable. The United States is liable only to the extent it waives sovereign immunity, here by the Federal Tort Claims Act. "The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. As true with all statutes waiving the sovereign immunity of the United States, we must strictly construe § 2674. *Levrie v. Department of Army*, 810 F.2d 1311, 1314 (5th Cir.1987).

In *Lucas v. United States*, 807 F.2d 414 (5th Cir.1986), this court held that Texas' malpractice liability cap limited the liability of the United States under § 2674. The Texas statute in *Lucas* capped civil liability of "physicians and health care providers" at $500,000, not including necessary expenses. *See* Tex.Rev.Civ.Stat. Art. 4590i, § 11.02 (Vernon 1986).[1] Lucas argued that § 11.02 was not available to the United States because the statute defined "health care providers" to include only state-licensed persons and facilities and, thus, to exclude federal facilities. We were persuaded that this argument rested upon an erroneous assumption—that Texas law controlled the scope of the federal government's waiver of immunity. Texas did provide a cap to the liability of certain types of defendants and Texas law defines these types. Which of the types are under like circumstances is, however, a federal question. That is, a state can create a liability scheme, but the threshold inquiry into the scope of the federal government's consent to be sued remains. That consent was only to the liability of individuals in like circumstances. The relevant question, then, was whether the federal defend-

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[1] The Texas Supreme Court, on certification of *Lucas*, found § 11.02(a) unconstitutional under the Texas constitution. *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988).

ants were in "like circumstances" as the private health-care providers subject to § 11.02.

The Ninth Circuit relied on *Lucas* in concluding that Californis'a malpractice liability cap, quite similar to the Texas cap, was available to the United States. *Taylor v. United States,* 821 F.2d 1428 (9th Cir.1987). Similarly, the First and Eleventh Circuits have allowed the United States the benefit of state collateral source statutes even though the statutes expressly applied only to state-licensed persons and facilities. *See Reilly v. United States,* 863 F.2d 149 (1st Cir.1988); *Scheib v. Fla. Sanitarium & Benev. Ass'n,*759 F.2d 859 (11th Cir.1985).

[3] Louisiana's malpractice liability cap differs from the caps at issue in *Lucas* and *Taylor.* Like the Texas and California statutes, § 40:1299.42 is not available across the board to all health care providers; instead, the statute imposes two additional conditions on the cap. First, the defendant must have filed with the state insurance commissioner proof of financial responsibility. And second, the defendant must have contributed to a patients' compensation fund. *See* §40:1299.42(A)(1) and (2). Section 40:1299.42(B) limits recoverable damages, excluding necessary expenses, to $500,000, limits the liability of health care providers to $100,000, and provides for payment of damages between $100,000 and $500,000 from the patients' compensation fund.

[4] This appeal thus presents a somewhat more difficult question than *Lucas* and *Taylor.* As the United States is clearly solvent, in any relevant sense, the complication is that the federal government never contributed to the compensation fund. The United States has offered to pay damages of up to $500,000 plus necessary expenses. But, of course, a private health care provider could not,

after the fact, gain the protection of § 40:1299.42 by such an offer. *See Abate v. Healthcare Intern.*, 560 So.2d 812 (La.1990); *Williams v. St. Paul Ins. Companies*, 419 So.2d 1302 (La.App. 4th Cir.1982). Nonetheless, we are persuaded that the United States is entitled to the protections of § 40:1299.42.

The "Like circumstances" inquiry is not overly stringent. As we explained in an earlier case:

> [The FTCA] is given broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claim suits on a footing of equality as between private parties within that state. Nice pieces of casuistry and hypersensitive legalisms are avoided.

Roelofs v. United States, 501 F.2d 87, 92 (5th Cir.1974). *Roelofs* itself involved a provision in the Louisiana Workers' Compensation statute that immunized from third party suits entities that either carried compensation insurance for their contractors' employees or paid their compensation benefits. This court held that the immunity was available to the United States because, by contract, it required its contractor to maintain compensation insurance and agreed to reimburse the expense. We reasoned that, through the alternative scheme, "the goals of Louisiana and the United States [were] mutually met." *Id.* at 93.

In identifying persons in like circumstances, we find it significant that state health care providers do not contribute to the compensation fund. Rather, a separate provision, § 40:1299.42, limits their liability to $500,000, not including necessary expenses. Like state providers, the United States does not contribute to the compensation fund, but neither does it drain the fund. And while the wealth of even "millionaire doctors"is subject to fluctua-

tion, the federal government's relevant solvency is certain and perpetual. In sum, the, because the United States has met the objectives of § 40:1299.42, it is in "like circumstances" with private individuals who have contributed to the fund and therefore enjoy capped liability.

IV.

[5] The Owens alternatively argue that the cap is invalid under Louisiana's constitution. The Louisiana Supreme Court has three times confronted, though never fully decided, the validity of the cap under the Louisiana constitution.[2] First, in *Sibley v. Board of Sup'rs of Louisiana*, 462 So.2d 149 (La.1985), a case involving a state health care provider, the Court held that § 40:1299.42 is valid under the due process and equal protection clauses of both the federal and state constitutions and the access to the courts clause of the state constitution. The Court later granted rehearing on several issues, however, including the validity of the cap under the equal protection clause of the state constitution. In its second opinion, the Court expressly rejected the federal equal protection analysis employed in its first opinion and announced a new framework giving more than minimal scrutiny to non-suspect classifications. *See Sibley v. Board of Sup'rs of Louisiana*, 477 So.2d 1094 (La.1985). The Court remanded to the trial court for further proceedings to determine if the statutory classification in § 40:L1299.42, a classification based on physical condition, furthers an appropriate state interest. The case subsequently settled. *See Deegan v. Raymond Int'l Builders, Inc.*, 518 So.2d 1082, 1085 n. 1 (La.App. 5th Cir.1987).

There were two appellate decisions between *Sibley II* and the third relevant Supreme Court decision. In *Williams*

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[2] The Owens do not raise any federal constitutional issues.

v. Kushner, 524 So.2d 191 (La.App. 4th Cir. 1988), a case involving a private health care provider, Louisiana's Fourth Circuit addressed the question left open in *Sibley II* and concluded that the cap is valid under the state's equal protection clause because the classification based on physical condition furthers the state's interest in the availability of medical care. The Fourth Circuit also upheld the cap under the access to the courts clause of the state constitution.

The following year, in *LaMark v. NME Hospitals, Inc.,* 542 So.2d 753 (La.App. 4th Cir.1989), the Fourth Circuit again faced the constitutional issue, but with a new twist. The appellants argued that § 40:1299.42 violates the state's equal protection clause because of a second statutory classification, a classification based on the number of claimants per act of malpractice. This argument rested on the fact that the $500,000 cap is the total recoverable per act of malpractice, regardless of the number of claimants. The Fourth Circuit concluded that this second classification also furthers the state's interest in the availability of medical care.

Finally, in *Williams v. Kushber,* 549 So.2d 294 (La.1989) (per curiam), the Supreme Court affirmed the Fourth Circuit's decision in *Williams*. The Court granted the writ to finally decide the constitutional issue, but upon closer analysis, concluded that the issue was not properly before it because the attending physician settled with the plaintiff before trial for $100,000. The Court did, however, uphold the portion of the statute limiting recovery from the compensation fund to $400,000. *See also Stuka v. Fleming,* 561 So.2d 1371, 1373 n. 7 (La.1990) (noting but not reaching the constitutional issue); *Eving v. Aubert,* 566 So.2d 616 (La.1990) (concluding that the appellant was without standing to raise the constitutional issue).

[6] The United States urges that the cap is valid under the Louisiana constitution, the Owens, urge that it is invalid, and both urge, as an alternative, that we certify the issue to the Louisiana Supreme Court. In diversity cases, in the absence of a controlling precedent by the highest court of the state, this court generally defers to the holdings of lesser courts "unless we are convinced by other evidence that the state law is otherwise." *Lucas*, 807 F.2d at 418; *accord Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385, 1388 (5th Cir.1980).

In *Lucas*, after reviewing several state appellate decisions finding the Texas cap unconstitutional, we decided to certify the issue to the Texas Supreme Court for three reasons. First, it was unclear whether the relevant appellate decisions were based on the federal or state constitution. Second, the fact that the Texas Supreme Court initially granted a writ in one of thecases evidenced that court's concern. The Court ultimately denied the writ, but cautioned that the appellate court need not have addressed the constitutional issue. Finally, the Court's resolution of other issues under the relevant constitutional provisions left us unable to predict their view with confidence.*See Lucas*, 807 F.2d at 418-21.

[7] This case is different. The Louisiana Supreme Court spelled out the state constitutional inquiry in *Sibley II;* and in *Williams*, the Fourth Circuit closely followed *Sibley II* in concluding that the cap is valid under the state's equal protection clause. The Owens point to the dissenting opinions in *Sibley II* and *Willaims* as an indication that the Supreme Court would find the cap invalid under the state constitution, but as we read the dissents, only one of the justices has clearly found the cap unconstitutional. *See Williams*, 549 So.2d at 308-12. It is true that the Court initially granted a writ to review *Williams:*

as in *Lucas*, this could indicate concern. It may equally be no more than a felt need to lay the issue to rest. Thus, this fact *alone* does not justify certifying the issue to the Louisiana Supreme Court. Instead, we defer to the Fourth Circuit's decision in *Williams* and conclude that the cap is valid under the state constitution.

V.

Because we conclude that Louisiana's malpractice liability cap is available to the United States, we need not reach the remaining issues on appeal. In sum, then, we conclude that the federal is entitled to the cap's protections because it is in "like circumstances" as private health care providers subject to the cap and that the cap is valid under the Louisiana constitution.

The judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.

A True Copy
Test

Clerk, U.S. Court of Appeal, Fifth Circuit

By /s/ Allison Granier
Deputy

New Orleans, Louisiana
Sep. 9 1991

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8195

U.S. COURT OF APPEALS
FILED
JUL 18 1991

D.C. Docket No. CA W 88 0081

EUGENE OWEN and DORA OWEN,
Individually and as Next Friend
For Alicia Marie Owen, A Minor,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

U. S. DISTRICT COURT
FILED
SEP 11 1991

Appeal from the United States District Court for the Western District of Texas

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Before GOLDBERG, HIGGINBOTHAM and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the cost on appeal to be taxed by the Clerk of this Court.

July 18, 1991

ISSUED AS MANDATE:
SEP 9 1991

A true copy
Test

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Allison Granier
Deputy

New Orleans, Louisiana
Sept 1991